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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 1240

GREAT LAKES PIPELINE COMPANY,

Appellant,

v.

THE COMMISSIONER OF TAXATION,

Appellee.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF MINNESOTA

MOTION TO DISMISS OR AFFIRM

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Appellee, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves the Court to dismiss this appeal, or, in the alternative, to affirm the judgment below for the following reasons:

There is no substantial Federal question presented as a basis of jurisdiction in this Court because the question at issue has been resolved by prior decisions of this Court.

QUESTION PRESENTED

Under the following circumstances, does the Due Process Clause of the Fourteenth Amendment prohibit apportionment to a taxing state of income and gain on short-term securities owned by a taxpayer:

(a) Where the fairness of the apportionment formula is unquestioned; (R. 13)

(b) Where the funds used by the taxpayer to purchase such securities are derived wholly from its unitary business activities conducted within and without the taxing state; (R. 25) and

(c) Where the whole of said income and gain realized on the securities, as well as the principal amount of the securities themselves, is thereafter entirely used in the business to pay various expenses and obligations. (Op. below)

The Minnesota Supreme Court, applying Minn. Stat. §290.17(4), answered the question in the negative.

ARGUMENT IN SUPPORT OF MOTION

Appellant's statement of the facts is candid and accurate. There are, however, three additional facts which we would mention here, and one finding of the Minnesota Supreme Court which we would like to emphasize somewhat. Appellant's avowed purpose in making only short-term investments was to keep these funds in a highly liquid state so that they would be readily available for use in the business (R. 29). Appellant made no showing, nor did it attempt to show, that the invested funds constituted a segregated account of any kind or that they were in any meaningful sense withdrawn or divorced from its normal business activities. They were at all

times carried as current asserts on its balance sheet. (R. 32, 33). The principal amount of the securities themselves, as well as the income and gain therefrom, was, as the Minnesota Supreme Court found, ". . . used entirely to pay various expenses and obligations of the pipeline activities." (Op. below). The financial power inherent in the possession of the securities was used by Appellant in the negotiation of large loans for expansion of its pipeline activities. (R. 33, 34)

In the case of a business carried on partly within and partly without the state, Minn. Stat. 290.17(4) (set out in full in Appellant's Jurisdictional Statement) provides, among other things, for the assignment to Minnesota, on an apportionment basis, of ". . . income from intangible property employed in such business. . . .". In the trial court, the principal inquiry was on the fact question of whether these securities were indeed employed in Appellant's pipeline business. No question was raised by Appellant in either court below, nor does it here raise any question as to the fairness of the apportionment formula *per se*. The Minnesota Supreme Court, in reviewing the facts, found that ". . . the record amply establishes that (Appellant) employed these intangibles in its pipeline business. . . .". It found that the Appellant's business was unitary, operating within and without Minnesota. It found that the securities were ". . . related to, form an integral part of, are correlated to, and used in connection with . . ." that business.

In the light of earlier decisions of this Court, and upon the record made in the trial below, Appellant surely cannot be heard to say that the tax violates Due Process concepts merely because the securities were physically located outside the State of Minnesota, or, as Appellant urges, because the income in question was "earned elsewhere."

> "In a unitary enterprise, property outside the state, when correlated in use with property within the state, necessarily affects the worth of the privilege (to do business) within the State." *Ford Motor Co. v. Beauchamp* (1939), 308 U.S. 331, 336.

To the same effect, regarding taxation of alleged extraterritorial income, see *Wisconsin v. J. C. Penney Co.* (1940), 311 U.S. 435, 445.

In the usual case of the type here under discussion, seldom, perhaps, does the evidence so clearly militate against a taxpayer's contentions as does that adduced here in the trial below. We do not believe this statement to be an exaggeration. The Minnesota Supreme Court stated:

> "We find *no evidence* which reasonably supports (Appellant's) contention that the investment income is not fairly attributable to Minnesota under §290.17(4)." (Emphasis supplied.)

Under *Butler Bros. v. McColgan* (1942), 315 U.S. 501, 507, the Appellant has the burden of showing by "clear and cogent evidence" that the tax is an extraterritorial exaction. The state of the record is such, we believe, as to permit no such claim to be now made. Nor can Appellant, on this record, reasonably expect the Court to re-examine the findings. See *Portland R. Co. v. Railroad Commission* (1913), 229 U.S. 397, 412; *Fry Roofing Co. v. Wood* (1952), 344 U.S. 157, 160. Yet Appellant does persist in quarrelling with the findings made below. Its assertion that the investment income is "at least one step removed from any Minnesota transaction" is, in reality, only an argument on the facts, though it purports to be an inquiry into the "scope" of the test laid down in *Butler Bros.* This Court there held (at 506), that if the

method of allocation is fairly calculated to assign to the taxing state only net income "reasonably attributable" to business done there, any constitutional question arising under the Fourteenth Amendment is "at an end." We suggest that the phrase "reasonably attributable" is a sufficiently clear guide to all courts and practitioners. It requires no searching inquiry to get at its meaning. To further paraphrase this commentary on the Constitutional provision might tend to confuse rather than shed light on the general subject. See *Wisconsin v. J. C. Penney Co., supra* at 444.

What is the "one step" which Appellant claims removes the investment income from all connection with Minnesota? It is merely the conversion of pipeline income into the most liquid investment Appellant can find. (R. 41) For what purpose? To 'get what it can' by way of return (R. 41) while keeping it readily available for use in the business. (R. 29) To the extent that Appellant's pipeline activities, including those in Minnesota, increase or decrease, the income available to purchase these securities increases or decreases; and, to the extent the securities and income thereon are used to support these same pipeline activities (100%), the business, including that in Minnesota, benefits directly. We submit that the income in question is "reasonably attributable" to Appellant's Minnesota business activities, and that requirements of Due Process, expressed in prior decisions of this Court, are satisfied.

Appellant places reliance upon *Hans Rees' Sons, Inc. v. North Carolina* (1935), 283 U.S. 123, and *Gen. Motors v. District of Columbia* (1965), 380 U.S. 553. Neither case has application here. In both cases, a single-factor apportionment formula was under attack and was found wanting by this Court. Here the formula is a 3-factor formula, is not under attack, and is of a type hitherto given approval by this Court.

Appellant's discussion of double taxation is a speculative argument on the possibilities. There is nothing in the record in this regard. Of such arguments, this Court said in *Northwestern States Portland Cement Co. v. Minn.* (1959), 358 U.S. 450, 463:

> "There is nothing to show that multiple taxation is present. We cannot deal in abstractions."[1]

Counsel for Appellee is reliably informed that there are presently pending in the State of Minnesota Department of Taxation, on an administrative level, 28 tax assessments, or proposed assessments, under Minn. Stat. §290.17(4), involving the issues present here. This figure includes the five taxpayers mentioned by Appellant. We suppose that in the ordinary course of business, some of these cases will be settled without litigation, and some will wind up in court. Upon trial, it may be found that some of these taxpayers employ the intangibles in their business, while others, as in *Cargill v. Spaeth* (1943), 215 Minn. 540, 10 N.W. 2d 728, do not. This seems to be a fair statement to make about any case

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[1] See dissenting opinion in *Gwin etc. Inc. v. Henneford*, 305 U.S. 434, 445, as follows: ". . . if national regulation to prevent 'multiple taxation' is within the constitutional power of this Court, it would seem to be time enough to consider it when Appellant or some other taxpayer is actually subjected to 'multiple taxation'." See also dissenting opinions in *Adams Mfg. Co. v. Storen*, 304 U.S. 307, 328; *McCarroll v. Dixie Greyhound Lines*, 309 U.S. 176, 189. The policy expressed in the *Northwestern States* case is certainly in accord with these earlier views and perchance is the direct outgrowth of them. See, e.g., *Northwest Airlines v. Minn.*, 322 U.S. 292, 295. With respect to the general subject of the national effect of state tax action, it should be noted that on January 26, 1966, the Special Subcommittee on State Taxation of Interstate Commerce, House Committee on the Judiciary, commenced hearings on the Interstate Taxation Act, H.R. 11798. This Act is concerned with uniformity of state taxation. See, *Northwest Airlines v. Minn.*, *supra*, at 302.

that depends on the facts. We do not believe these cases do, or will, present a substantial Federal question in the sense that Appellant urges.

CONCLUSION

Inasmuch as Appellant's contentions concerning denial of Due Process have been foreclosed by prior decisions of this Court, which decisions have been correctly applied to the facts by the Minnesota Supreme Court, we respectfully submit that this appeal should be dismissed, or, in the alternative, that the judgment below should be affirmed.

Respectfully submitted,

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